IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 387

CALIFORNIA,

Petitioner,

v.

JOHN ANTHONY GREEN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The decision of the Supreme Court of California of which petitioner seeks review is reported as *People v. Green*, 70 A.C. 696, 75 Cal. Rptr. 782, 451, P.2d 422. It appears in the Record Appendix at page 104. The decision of the District Court of Appeal, Second Appellate District, County of Los Angeles, is also reported as *People v. Green*, appears at 265 A.C.A. 1, 71 Cal. Rptr. 100, and is reprinted as an Appendix to the State's petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution, California Evidence Code § § 770 and 1235, and California Health and Safety Code § 11532 appear as Appendix A attached hereto.

QUESTIONS PRESENTED
(as posed by petitioner)

1. Do the holdings of this Honorable Court in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 and *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255, prohibit the states from adopting rules of evidence permitting admission of prior testimony and inconsistent statements for the truth of the matters asserted of a witness who is present in court and subject to cross-examination by counsel for defendant?

2. Does the Confrontation Clause of the Sixth Amendment, as construed in *Barber* and other recent decisions of this Court prevent adoption by the states and the Federal Courts of rules of evidence in accord with modern and enlightened legal authority permitting the admission for the truth of the matters asserted prior testimony and inconsistent statements of a witness who is present at the trial and subject to cross-examination and scrutiny as to demeanor by the trier of fact?

STATEMENT

Respondent was convicted by a judge without a jury in the Superior Court of the State of California for the County of Los Angeles of violating the California Health and Safety Code, § 11532, which prohibits the furnishing, selling and/or giving of a narcotic to a minor (A. 98). At the time of the alleged offense, respondent was twenty-four years old, and the young man to whom he purportedly gave

marijuana, Melvin Porter, was sixteen (Tr. 4; A. 3, 55).[1] The alleged crime occurred in January 1967 (A. 1).

The only witness to the "crime" was Porter, and it was one of his stories that convicted respondent. Before, during and after the trial, *Porter gave four separate and entirely different versions of the events surrounding the alleged offense*:[2]

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[1] "Tr." refers to the original transcript of the preliminary hearing held on February 8, 1967, on file with the Clerk. "A." refers to the printed Appendix distributed to the Court. "Trial" refers to the original transcript of the trial held on April 5-7, 1967, on file with the Clerk.

[2] The dependability of Porter as a witness can best be gauged by the Court's own characterizations of him. Thus, during the trial and the post-trial proceedings, the Court said of Mr. Porter: "* * * the witness' actions so far have indicated a certain hostility by lack of knowledge" (A. 13); "* * * this is a highly unsatisfactory performance on the part of this young man * * *" (*ibid.*); "* * * I am not particularly satisfied with the course of the witness' behavior here * * *" (A. 14); "* * * I want to see just how delinquent he is in his answers, and whether or not there may be some other course we may have to take with his attitude" (*ibid.*); "I am aggravated at his reluctance to act as a normal witness to respond to questions that have been asked of him" (A. 18); "* * * what is the probative value as to this 16 year old who comes in here and defies the Court and counsel with his non-responsive, insolent answers?" (A. 29); "What concerns me about this apparently worthless type of youth * * *" (A. 30); "I think the Court has to take judicial notice of the debased worthlessness of this young Porter who testified before the Court, who counsel observed" (Trial 185); "* * * his poor mother has the sympathy of this Court. He is a derelict of society at 17 years of age" (*ibid.*); "I sympathize with his mother. I have never seen as caloused, from his own testimony, a youth of 16 * * * as this boy on the stand at his age" (Trial 194); "Taking Porter as the renegade that he is, and the small probability attached to the veracity of this young renegade * * *" (Trial 210); "I think that one of the reasons this juvenile is as worthless as he is * * *" (Trial 228); "* * * he would not have been the worthless youngster of sixteen that came in here before the Court" (*ibid.*).

The prosecutor himself was forced to admit Mr. Porter's worthlessness and lack of veracity. For example, he said of him: "* * * practically, of course, if the entire case depends on the veracity of the

1. Porter as well as respondent was arrested for violating the Health and Safety Code (Tr. 29, 30-31; A. 13). On January 31, 1967, four days after his arrest and while he was still in police custody, Porter was interrogated by Officer Barry Wade at Juvenile Division Headquarters (A. 27, 31, 38, 41). No one was present except those two (A. 27). According to Officer Wade, Porter told him that sometime between January 1 and January 10, respondent called Porter on the phone, said he had a kilo of marijuana, and asked if he could bring it over and leave it with Porter. Respondent referred to the drug as "stuff" or "grass" (A. 37). Porter said respondent could come over, and respondent personally delivered to Porter that same afternoon at Porter's house a brown shopping bag containing twenty-nine wax bags of a green leafy material resembling marijuana (A. 37). According to an offer of proof covering the same interrogation by Officer Wade, respondent told Porter that Porter could keep one bag for himself and that respondent would pick up the remaining bags at a later date (A. 32).

2. On February 8, 1967, Porter testified at a preliminary hearing in this case before Committing Magistrate Leila Bulgrin of Division 68, Municipal Court of the Los Angeles Judicial District, and gave his second version of the offense. He was still in custody, having pleaded guilty to a sale of

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juvenile, the Court is going to have some serious problem" (Trial 184); "Now, relating the evidence in this case, this young man, this Porter, obviously is not an Eagle Scout" (*ibid.*); "* * * your Honor, as well as I, thought that the testimony of the young man was certainly evasive and, perhaps, untruthful in certain details * * *" (Trial 185); "* * * the defense put on witnesses to testify to the lack of his reputation for lacking truthfulness and so forth, I am sure it is true * * *" (*ibid.*); "* * * Porter, whether he is a punk or not, doesn't matter" (Trial 190); "It is easy on a case like this to put Porter on trial and say, 'Well, such a crummy kid is not to be believed, and he told different stories * * *" (Trial 204); "* * * Porter certainly has told different stories * * *" (*ibid.*); "* * * I don't think the Court, or myself for that matter, had ever placed any great confidence in the integrity of Porter * * *" (Trial 220).

Two witnesses testified at the trial as to Porter's bad reputation in his community. See Trial 96-97, 99.

marijuana (Tr. 29-30, 31). This time, he said that respondent called him on January 5th or 6th and asked if he could come over because he wanted Porter to sell a kilo of "marijuana" (Tr. 5-6; A. 19-20). Respondent did come over, and following a conversation respondent took Porter to the house of respondent's father and showed him a bag behind a bush in the back yard (A. 21-22; Tr. 22-23). The arrangement was that Porter was to pay respondent for the marijuana after he in turn had sold it to others, although Porter could not remember whether respondent told him how much to sell it for (Tr. 7, 16, 25). The two left the bag behind the bush. Either the same night or the next night (*cf.* Tr. 14 with Tr. 23), Porter went with one Bob Smootz back to the home of respondent's father, and while Smootz waited on the street, Porter found the bag behind the bush and returned with it to his own home (Tr. 16-17, 18, 22-23). (Smootz later swore at the trial that he never made any such trip A. 70.) Porter temporarily put the shopping bag, which contained twenty-nine smaller bags, or "baggies," in his closet (Tr. 6, 18-19, 21). The next day, Porter took out about seven of the smaller bags and smoked marijuana in his back yard (Tr. 8, 11-12, 19-22). Apparently on the same day, he sold a few bags and gave respondent $60 to $80 in cash (Tr. 7, 24). On the following Sunday, some one broke into Porter's house and stole the shopping bag with about twenty-two baggies in it (Tr. 7, 21, 22, 30). There was now only one baggie left—one which had been hidden under a book counter (Tr. 10-11, 29-31, 32). Officer Dominquez, an undercover agent, came to Porter's house and bought this baggie (*ibid.*). The officer asked where Porter had gotten it, and Porter said, "A guy named John" (Tr. 29). The officer left, and Porter was subsequently arrested.

3. The third version of Porter's story was given at trial before Judge Prentiss Moore of the Superior Court of Los Angeles County. By now Porter was on probation from his conviction upon a plea of guilty to a sale of marijuana (A.

13). He said he thought[3] respondent had called him about some "stuff" respondent wanted to sell (A. 5-6, 8). Porter, however, could not remember any of what happened afterward. He knew he received some marijuana, but he had no idea whether respondent came to his house (A. 7, 11, 12, 17); whether, if he came, respondent brought anything with him (A. 7-8, 11-12); whether anyone told him where to find marijuana (A. 17), or where he got the marijuana (A. 12). The reason for this confusion and lack of recollection, he said, was that some twenty minutes before respondent called him, he had taken LSD, which he had obtained from a man called "Lug Head" at Topanga Plaza (A. 7, 12, 17, 23-24, 26, 66-67). The drug produced a highly hallucinatory affect on him (A. 23-24). He had also taken LSD on several other occasions prior to this incident (A. 5, 23).

At this point in the trial, the prosecutor, over objection (A. 8) and relying entirely on California Evidence Code § § 770 and 1235, quoted selectively[4] from Porter's testimony at the preliminary hearing in an attempt to prove that respondent had in fact given the marijuana to Porter (A. 9-10, 19-22). Porter's response at trial as to whether any of this testimony given at the preliminary hearing had been truth-

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[3] "Q. Did he call you at your home?
"A. Yeah, I think so, yes.
"Q. Did you speak with him on the telephone?
"A. Yes.
"Q. Did you recognize his voice?
"A. Oh, yeah, I guess I knew it was him; I guess.
"Q. You had spoken to him before on the telephone?
"A. Yeah.
"Q. Did you have a conversation concerning narcotics?
"A. Well, he called me up, and he just said that he had some stuff he wanted me to sell." (A. 5).

[4] Porter's testimony at the preliminary hearing covered twenty-seven pages. Only six and a half of these pages were quoted at the trial. As noted by the California Supreme Court, "With one unsignificant exception, Porter's preliminary cross-examination was not read to the court" (A. 112 n. 5).

ful and accurate was, at best, equivocal.[5] He could not say whether it was accurate or not, because he had been under the influence of LSD at the time of the events in question

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[5] Q. BY MR. IDEMAN: Now, do you remember so testifying?
A. Well, not—like I said, I can't remember that much, but—
Q. Well, I am asking you now whether you remember being asked these questions and giving these answers at the time of the preliminary hearing?
A. Somewhat, yes.

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Q. BY MR. IDEMAN: Now, Melvin, is there anything in there, what I have read to you, that is not true, that you did not say at the time of the preliminary hearing?
A. Well, like I say, I can't remember what I said at the preliminary hearing.
Q. Is it a fact that at the time of the preliminary hearing you were telling the truth as you believed it to be at that time?
A. Yes, I believed it to be at that time, yes.
Q. I see; and the present testimony is that you don't remember whether the defendant brought you anything?
A. After the phone call that—I can't absolutely say that he came over and brought me anything, no. [A. 10-11].

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Q. Now, Melvin, up to this point the questions and answers that I read to you, are those the questions that were asked of you at the preliminary hearing and were those the answers that you gave?
A. Well, as well as I can remember, yes.

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Q. You were telling the truth at the time that you were testifying then? is that right?
A. Yes. [A. 20.]

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Q. BY MR. IDEMAN: Now, were those questions asked of you, and did you give those answers at the preliminary hearing?
A. Yes, I guess so, yes. I'm pretty sure.
Q. Does that refresh your recollection as to where you got that shopping bag full of marijuana?
A. Well, I mean—like I already said, I can't be that sure. I mean—

[continued]

and simply had no memory of what had occurred (A. 7, 12, 17, 23-24, 26, 66-67). Porter's testimony quoted from the preliminary hearing and his statement to Officer Wade constituted the *only* evidence adduced at trial that respondent had given marijuana to Porter, which was the sole criminal charge placed against him (A. 1).

Only two other witnesses appeared for the prosecution at trial. Officer Wade testified to his interrogation of Porter, as outlined above. The testimony of the other witness, Officer Ramon Dominguez, was entirely consistent with respondent's defense. The officer said that about eight or nine days after he bought some marijuana from Porter on January 10, 1967, he called Porter to make arrangements for further purchases (A. 47-48). He then received a call

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Q. Melvin, my question is, my reading the questions and answers to you, does that refresh your recollection? Does that make you remember where you got that shopping bag of marijuana? * * *

THE WITNESS: I guess so, yes. [A. 22.]

* * *

Q. [By defense counsel]. Now, the Deputy District Attorney has read to you certain testimony and has asked you some questions concerning that.

Now, did that refresh your recollection as to what you testified to at the time of the preliminary hearing?

A. Yes.

Q. Now, did it refresh your recollection as to what actually happened that first week in January?

A. Well, I could remember more then; but if that is what I said, that is probably what happened, yes.

Q. Did it merely refresh your recollection as to your testimony at the time of the preliminary hearing, or did it refresh your recollection as to what actually happened?

A. Mostly my testimony, I guess.

Q. So you are still unsure as to actually what happened after Mr. Green had phoned you on the telephone, and after you had taken this dose of LSD; is that correct?

A. Do you mean am I uncertain?

Q. BY MR. COONEY: Yes, that's the question.

A. Yes, I'm not positive now. [A. 24-25.]

from a man identifying himself as "John," and they arranged to meet at Gus' Hot Dog Stand (A. 49), where Porter was employed (A. 51). The two met outside the stand, and a purchase of marijuana was discussed (A. 50-51). Respondent handed the officer a glass of Coca-Cola with a powdery substance in it, told him it was LSD, and asked him to drink it. The officer declined (A. 52-53). Respondent also asked him if he would smoke some marijuana (which respondent did not produce), and the officer again declined (A. 53-54). At that point all "negotiations" broke off (A. 53).

In regard to this incident, the versions given by both Porter and respondent were entirely consistent with that given by Officer Dominguez, with some important additions. Porter testified that he had told respondent he thought Dominguez was a police officer, and he admitted he might have asked respondent to find out if this were a fact (A. 57-58). Respondent testified that Porter, who had been a friend of long standing (A. 75-76, 79, 86), did ask him to find out if Dominguez was a police officer (A. 77, 83-84, 87-89, 96). The two planned that if Dominguez really wanted to buy, respondent would sell him peat moss instead of marijuana and baking soda instead of LSD (A. 76-77, 89-90). Respondent met with Dominguez at the hot dog stand and, realizing that a police officer would not take LSD or smoke marijuana, pretended that an aspirin pill in a glass of Coca-Cola was LSD and that some marijuana was hidden under a car (A. 76-78, 84-85, 92-95). The tests—entirely innocent in respondent's eyes (A. 83-84)—proved valid in the light of Dominguez's refusal to participate, and Dominguez was revealed to respondent's satisfaction to be an undercover agent.

Respondent denied that he had ever sold or given Porter any drugs of any kind, that he had ever seen Porter smoke marijuana, or that he himself had ever dealt in drugs (A. 76,

79, 86-87). The only thing he did do, he said, was to attempt a favor for a friend (A. 79).[6]

Why did Porter turn on respondent and identify him as the source for his marijuana? The answer was supplied by Porter himself, by respondent, and by one Daniel Blackmore. They testified that respondent had sold Porter a car sometime prior to the alleged crime, that Porter had been unable to keep up his payments, and that on the very day Porter was arrested, respondent repossessed the car (A. 60-61, 64-65, 68-69, 76, 87, 90, 97). Blackmore testified that Porter was mad at respondent and told Blackmore he "was going to get back" at respondent (A. 69). Porter virtually admitted on the stand that he told Blackmore he was going to get even with respondent (A. 60-61, 65).

4. Porter's fourth version of the events in question was introduced after respondent was convicted. In a notarized statement submitted as part of a motion for a new trial and made on the advice of his probation officer, Porter swore that respondent had never sold him drugs, that Porter had understood from "Lug Head" that he would be compelled to name some person as his supplier of drugs, that he therefore arranged for respondent to see Officer Dominguez, that the police told him he would be "out of circulation for a long time" unless he implicated respondent, and that he did implicate respondent because of fear and an "inability to distinguish between reality and fantasy" (A. 99-100).

The trial court seems to have found respondent guilty on the theory that if he had really been repelled by Porter's prior use of drugs, as he claimed, he would not have offered to take part in the scheme to uncover Officer Dominguez (Tr. 208-212). The trial judge gave no indication as to which of Porter's pre-trial statements he believed, if either.

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[6]Respondent's denial of guilt is supported by additional facts in the record. Despite an attempt by the prosecution to portray respondent as someone engaged in the trafficking of drugs, investigation revealed that respondent worked for eight different employers and earned a total of $4,000 in 1966. See Trial 166, 169.

Respondent's motion for a new trial was denied (A. 101), and he was sentenced to five years in prison, the sentence to be suspended on condition, *inter alia*, that he serve one year in the county jail (A. 101). Respondent appealed to the District Court of Appeal, Second Appellate District of Los Angeles, which unanimously reversed his conviction on the ground that permitting the introduction of testimony given at a preliminary hearing for the truth of the matter asserted by a witness at trial was a denial of the right of confrontation under the Sixth Amendment to the United States Constitution. California Evidence Code § 1235, pursuant to which this evidence had been admitted, was thus held unconstitutional, the court relying on *People v. Johnson*, 68 Cal. 2d 599, 441 P.2d 111 (1968), and *Chapman v. California*, 386 U.S. 18 (1967).

The State appealed, and the California Supreme Court unanimously agreed with the lower appellate court and reversed the judgment of conviction. The Court relied upon its own *Johnson* decision, *supra*, which held the Evidence Code unconstitutional when applied to prior inconsistent testimony given to a grand jury without the presence of the defendant, his counsel or the ultimate trier of fact, and in addition upon this Court's decisions in *Pointer v. Texas*, 380 U.S. 400 (1965), *Barber v. Page*, 390 U.S. 719 (1968), and *Berger v. California*, 393 U.S. 314 (1969). The California Supreme Court gave numerous reasons why cross-examination at a preliminary hearing is not adequate: the trier of fact cannot observe the witness' demeanor and manner while he is testifying; the trier of fact cannot observe the cross-examiner's style, rapport, etc.; the attorney may conduct himself differently before a committing magistrate than before a trial court or jury; since the purpose of a preliminary hearing is so different from that of a trial, neither prosecution nor defense may be willing or able to cross-examine fully; there is usually too little time before the preliminary hearing for adequate preparation; any other ruling would result in converting the preliminary hearing into a full-scale trial, etc.

This Court granted the State's petition for a writ of certiorari and respondent's motion for leave to proceed in forma pauperis (A. 119), and appointed the undersigned attorney to represent respondent in this Court.

SUMMARY OF ARGUMENT

The two pre-trial statements given by Porter—the unsworn one to Officer Wade and the one at the preliminary hearing—constituted the only evidence at trial of respondent's guilt. Yet at trial respondent failed to verify the facts in the prior statements, and instead informed the Court for the first time that on the day of the alleged offense, he was under the influence of LSD. Since respondent was denied contemporaneous cross-examination before the trier of fact as the statements that convicted him were introduced, he was denied his right of confrontation under the Sixth Amendment to the United States Constitution.

The right to confront a witness at the time his statements are made is paramount in a criminal trial. Confrontation requires the witness to give the testimony upon which the prosecution relies for conviction while the witness is confronted and cross-examined by the defendant at trial, thus maximizing the likelihood that the witness will tell the truth. The trier of fact is allowed to view the demeanor and manner of the witness while the incriminating testimony is actually being given. And the subjective moral impact of the courtroom is brought to bear in eliciting the truth at the very time the all-important testimony is being produced. Because these requirements of confrontation were missing, the trier of fact at trial could *not* determine the truthfulness of Porter's prior statements that convicted respondent.

The Sixth Amendment right of confrontation was an outgrowth of the common law, and the California Evidence Code is a restriction on that common law right. The decisions of other courts and of this Court—particularly

Bridges v. Wixon, 326 U.S. 135 (1945); *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *United States v. Wade*, 388 U.S. 218 (1967); *Barber v. Page*, 390 U.S. 719 (1968), and *Bruton v. United States*, 391 U.S. 123 (1968)—clearly require contemporaneous confrontation and cross-examination before the trier of fact.

The recognized exceptions to the right of confrontation are not applicable here. Since Porter was present at trial, there was no necessity in the constitutional sense for the introduction of his prior statements. Moreover, the "necessity" exception assumes that the prior statement and the testimony the declarant would have given at trial would be the same, whereas here we have positive proof that they are not. As for the requirement of trustworthiness, it simply does not apply in this case, where the witness was under the influence of LSD at the time of the alleged offense, where he gave four different and conflicting statements, and where he was in police custody and charged with a crime when he made the two statements that incriminated respondent.

Not only would an adoption of the State's position deny the respondent his Sixth Amendment rights and be unfair to him in his attempt to defend himself, but it would have an extraordinarily adverse effect on the fair administration of justice generally. Among other results, attorneys would have to be appointed at earlier stages, pre-trial hearings would be greatly expanded to allow full and complete cross-examination of all witnesses, preliminary hearings would have to be delayed to allow defense attorneys proper time to prepare for cross-examination, etc.

For all these reasons, the conclusion reached unanimously by two appellate courts and nine judges below should be approved, and the judgment of the California Supreme Court should be affirmed.

ARGUMENT

Two types of statements were introduced at respondent's trial to prove his guilt. One was an oral statement to a police officer while the declarant was in custody and under charge for a crime. This statement was unsworn, and the declarant was not subject to cross-examination at the time it was made. No written transcript or rendition of the statement was introduced; rather, the officer to whom it was made testified as to his recollection of it. Insofar as the State is arguing for the admissibility of this type of statement, it is really rearguing *People v. Johnson*, 68 Cal. 2d 646, 441 P.2d 111 (1968), in which this Court denied certiorari. 393 U.S. 1051 (1969). In that case the California Supreme Court held it a violation of the Sixth and Fourteenth Amendments for the State to introduce the grand jury testimony of a witness as substantive evidence at trial, when neither the defendant nor his attorney had been present at the grand jury proceedings to cross-examine the witness.

The second statement made by Porter that implicated respondent was made up of selected portions of the testimony of the same declarant during respondent's preliminary hearing. Respondent's attorney did cross-examine Porter on this statement at the hearing, although his cross-examination was limited and was not read or introduced at the subsequent trial. The hearing was held before a committing magistrate, a different person than the Superior Court judge who found respondent guilty at trial.

The State has not differentiated these statements in its brief to this Court. The State takes the broad position that *any* statement, whether sworn to or not, whether or not the declarant was cross-examined on it, and regardless of the circumstances under which it was made, is admissible at trial for the truth of its contents, so long as the declarant is available at trial for cross-examination.

On the possibility that the Court might deem one type of statement inadmissible but the other admissible, respond-

ent is addressing himself in this brief to the unconstitutionality of the admission of both types of statements.

Although the issue before the Court is essentially a legal as opposed to a factual one, it could not have been posed against a factual backdrop that more dramatically and illuminatingly demonstrated the risks and dangers of any result other than the one reached by the California Supreme Court. Just as "The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case" (*Sibron v. New York*, 392 U.S. 40, 59 (1968)), so too the facts in this case bear stark witness to the constitutional disability.

The prosecutor was quite correct when he told the trial court that how Mr. Porter came into possession of twenty-nine baggies of marijuana was "the crux of the case" (A. 36). That was the only issue. The charge was that they were furnished by respondent (A. 1); the defense claimed that Porter came into possession of them through some other source. No direct evidence given verbally at trial could have convicted respondent of the charge: Porter could not remember what had occurred; Officer Wade could testify only as to what Porter had previously told him (see *Douglas v. Alabama* 380 U.S. 415, 419-420 (1965)); and Officer Dominguez testified to an entirely separate incident, one that was perfectly consistent with the defense version of events.

Thus, only if Porter's statement previously given to Officer Wade, or his entirely different statement submitted at the preliminary hearing, was taken as evidence of the truth of the events related herein could any guilt be ascribed to respondent. To put it another way, without each or both of those prior statements, respondent could not have been convicted constitutionally, for there would have been no evidence on which to base a finding of guilt. *Thompson v. Louisville*, 362 U.S. 199 (1960); *Johnson v. Florida*, 391 U.S. 596 (1968).

There was a very good reason why Porter at trial could remember nothing of the crucial events surfounding the offense. As he had done on other occasions, he took LSD immediately prior to a telephone call which he "thought" was from respondent and thereupon lapsed into a highly hallucinatory state (A. 7, 12, 17, 23-24, 26, 66-67). Official public documents of the United States Government attest to the immediate and far-ranging effects of LSD. Thus, "Fact Sheets (1969)," published by the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, has this to say about LSD (p. 9-1):

> LSD-25 (Lysergic Acid Diethylamide) known to the "hippie" cult as "acid" is derived from the ergot fungus of rye, a disease of the rye grain. It can be found as a liquid or powder. A dose of 50 to 200 micrograms (no larger than the point of a pin) will take the user on a "trip" for approximately 8 to 16 hours.
>
> Physical reactions may include dilated pupils, lowered temperature, nausea, "goose bumps," profuse perspiration, increased blood sugar, and rapid heart beat. During the first hour after ingestion the user may experience visual changes followed by extreme changes in mood. In the hallucinatory state, the user may suffer loss of depth and time perception accompanied by distortions with respect to size of objects, movements, color, spatial arrangement, sound, touch, and his own "body image." During this period the user's ability to perceive objects through the senses, to make sensible judgments, and to see common dangers is lessened and distorted, hence making him susceptible to personal injury. He may also injure others in the event he decides to drive a car.
>
> After the "trip" the user may suffer acute anxiety or depression for a variable period of time. Recurrences of hallucinations have been reported days, or months, after the last dose.

Similarly, "LSD-25: A Factual Account (1969)," published by the same Bureau, states (p. 8):

> There is little controversy about the *immediate* physical effects of LSD, many of which resemble the effects of other drugs; pupillary dilation, palpitations, elevated blood pressure, and others less noticeable. Neither is there much disagreement about the *immediate* psychological effects, though they may vary from one individual to the next. Some of these are: distorted perception, exaggeration or swing of certain emotions (such as anxiety and euphoria), changes in thought processes (such as loss of the sense of time), depersonalization or loss of the sense of self or separateness, magnification of the importance of common scenes or objects, loss of judgment, and terror.
>
> One other hazard is unquestioned as a risk, although its true incidence is unknown; the possibility of recurrences of the acute effects of the drug as long as *twenty* months after ingestion. [Emphasis added.[7]]

It becomes clear, therefore, that Porter's statements offered at the preliminary hearing and to Officer Wade as to how he obtained the baggies of marijuana were a product of his "inability to distinguish between reality and fantasy," as he himself later admitted (A. 100). If the Court requires any assurance on this score, it need only compare the facts in one statement with the facts in the other. In one version, respondent called Porter and asked if he could leave a kilo of marijuana in his custody, to be picked up later by respondent (A. 32, 37). In the other, respondent was to leave the marijuana with Porter so that Porter could sell it and return the money to respondent (Tr. 5-6; A. 19-20). In one version respondent personally delivered the marijuana to Porter on the same afternoon as the telephone call (A. 37). In the other, respondent took Porter to the house of respondent's father and showed him a bag of marijuana behind a bush, and Porter himself picked up the bag at a later time (A. 21-

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[7] A more detailed discussion of LSD from this same pamphlet appears as Appendix B to this brief.

22; Tr. 14, 22-23). In one version, as court and counsel noted, respondent called the drug "stuff" or "grass" (A. 37); in the other he called it "marijuana" (A. 19-20). No wonder that both the trial judge and the prosecutor found Porter to be totally without credibility (n. 2, *supra*). For the State now to view Porter's preliminary hearing testimony or his statement to Officer Wade as having the mark of truthfulness is to ignore the fact that Porter was incapable of telling the truth, and proved it by a series of four conflicting and totally irreconcilible versions of the same events.

If we are to turn to the *probabilities* of the situation, it is more likely that Porter really was under the influence of LSD at the time of the alleged crime and that his subsequent assertions of respondent's involvement were the product of a frightened and confused mind. Porter, after all, was himself in custody at the time of his statements to Officer Wade, and had been for four days (A. 27, 31, 38, 41). He thought he had to name a supplier of the marijuana he had sold to an undercover agent (A. 99), and whom better to name than the person who had just repossessed his car and whom he intended to "get back at" anyway (A. 60-61, 65, 69)? When he testified at the preliminary hearing, Porter was still in custody (A. 65), he had pleaded guilty to a charge of selling marijuana (A. 29-30, 31), and he would not be released until some eight days later (A. 65). So far as the record shows, he never was represented by counsel. His fear, arising out of the predicament of his circumstances, is obvious. "Common sense would suggest that he [an accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

It is against this kind of background that we must view the assertions made by the State. In no set of circum-

stances could it be more apparent that striking from the Confrontation Clause of the Sixth Amendment the requirement of *contemporaneous* cross-examination before the trier of fact—except, perhaps, in the case of absolute necessity, which is discussed below and which is not a factor here—completely destroys the ability of a person to defend against untruthful statements made in fear, out of spite, or for any other reason.

It is with this factual background in mind that we turn to the law. Our position is that Section 1235 is too broad and, particularly as applied in this case, operates as an unconstitutional abridgment of respondent's right of confrontation under the Sixth Amendment, made applicable to the states through the Fourteenth Amendment. We ask the Court to affirm as within the scope of the Confrontation Clause the succinct language of the Eighth Circuit: "The right to confront the witness *at the time the statements are made* is paramount in a criminal trial." *Goings v. United States*, 377 F.2d 753, 762 n. 12 (1967) (emphasis added).[8]

History of Confrontation

The right to confrontation did not originate with the Sixth Amendment but was a common law right "* * * which had gained recognition as a result of the abuses in the trial of Sir Walter Raleigh." F. H. Heller, the Sixth Amendment to the Constitution of the United States 104 (1951).[9] The first change from the use of sworn *ex parte* statements came in the early 1600's by having the deponent appear at trial and affirm his statement. "[T]he emphasis came gradually to be transferred from the sworn statement, as the sufficient testimony, to the statement on the trial as the essen-

[8] In using this language, the court was expressly rejecting what we hereafter refer to as the "academic" position urged by the State as opposed to the "orthodox" position which we advance.

[9] For an exhaustive study, see 5 Wigmore, Evidence, § 1364 (3d ed. 1940), where the rule is traced from the Sixteenth Century to its present form.

tial thing." 5 Wigmore § 1364 at 21. By the middle of the Seventeenth Century, the rule developed that extrajudicial statements could be used only if the deponent was unavailable. At this point, reliance was not yet placed on cross-examination; the oath and the requirement that testimony be given at trial were the protectors of truth. The importance of appearance by the witness at trial had grown to the point that this requirement could be waived only in cases of necessity. By the early 1700's, the importance of cross-examination became recognized, and sworn extrajudicial statements lost their special standing. The rule developed that "statements used as testimony must be made where the maker can be subjected to cross-examination." 5 Wigmore § 1364 at 25. In England at the end of the Eighteenth Century, unsworn extrajudicial statements were being excluded as evidence, except that prior consistent statements could be used to corroborate testimony on the stand. 5 Wigmore § 1364.

Thus, at the time of the enactment of the Sixth Amendment, while the right of cross-examination had become an indispensable part of confrontation, there remained the even longer-standing requirement that testimony on which a conviction could be based had to be given at trial. The orthodox rule of evidence on prior inconsistent statements substantiates the recognition of the common law that testimony to be used against the accused had to be given or adopted by the witness at trial.

Numerous state cases attest to the proposition that statements not subject to cross-examination must be rejected, the rationale being that only through cross-examination can the opposing party either diminish the trustworthiness of the witness or force him to reveal other facts that would qualify his statement.[10] But consideration by the courts of

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[10] *E.g., Green v. Caulk,* 16 Md. 556, 578 (1860); *Bartlett v. Kansas City Pub. Serv. Co.,* 349 Mo. 13, 16, 160 S.W. 2d 740, 742 (1942). See Maguire, "Evidence: Common Sense and Common Law" 45-50 (1947).

the precise constitutional question at issue here has not usually been necessary, since the problem has almost uniformly been avoided by the hearsay rule. Until recently, it has been the universally-accepted rule that prior inconsistent statements of a witness at trial may be used only to impeach that witness and are not admissible as evidence for the truth of the matter asserted.[11]

Therefore, to hold in respondent's favor is not to broaden confrontation but rather to preserve what has previously existed. As this Court said in *Salinger v. United States*, 272 U.S. 542, 548 (1926), "The purpose of [the Confrontation Clause], the Court often has said, is to continue and preserve [the common law right with its recognized exceptions], and not to broaden it or disturb the exceptions." The *modification embodied* in the California statute, on the other hand, reduces the degree of confrontation which has been a traditional part of the common law.

As the cases and commentators have recognized, perhaps the most crucial aspect of confrontation, disregarded by the academic position, is the importance of timely, contemporaneous cross-examination. As the Supreme Court of California stated in *People v. Johnson, supra*, 441 P.2d at 117:

> To assert that the dangers of hearsay are "largely nonexistent" when the declarant can be cross-examined at some later date, or to urge that such a cross-examination puts the later trier of fact in "as good a position" to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disre-

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[11] *E.g., Southern Ry. v. Gray*, 241 U.S. 333 (1916); cases cited in 3 Wigmore § 1018; Note, 133 A.L.R. 1454. The State points to the American Law Institute's Model Code of Evidence, Rule 503. It should be noted, however, that the Institute's Comment following the Rule recognizes that while a "few recent cases" support the Rule, "Almost all the decisions reject evidence of prior consistent or prior inconsistent statements of a witness when offered for the truth of the matter stated. When received, it is received only to impair or to support the credit of the witness" (p. 233).

gard the critical importance of *timely* cross-examination.[12]

The leading case rejecting the academic position continues to be *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939), which discusses the importance of timely cross-examination and illuminates other inadequacies of proposals to abandon the orthodox rule. Because the opinion by the Minnesota court is as persuasive today as when it was rendered, and because it deals so cogently with many of the points put forward by the State, we quote from it at some length:

> The rule is well settled that the only office of impeaching testimony of this kind is to negative or neutralize the testimony to which it is directed. (It may also discredit the witness as such.) [Citations.] That is what Dean Wigmore calls the orthodox and "universally maintained" rule of American decision law. Although approved in the first (§ 1018), it is disapproved in the second edition of Wigmore, Evidence (§ 1018). The disapproval of the learned author is put upon the ground that the impeached witness testifies finally under oath and subject to cross-examination. Hence, he concludes, "The whole purpose of the Hearsay rule has been already satisfied," and so "there is nothing to prevent the tribunal from giving such testimonial credit to the extra-judicial statement as it may seem to deserve."
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> That, we submit with deference, is not enough to qualify the previous contradictory assertion as substantive evidence. The oath of the witness solemnizes his former extrajudicial statement not at all. It goes only to his testimony which is occasion for and target of the impeachment. The previous statement was when made and remains an ex parte affair, given without

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[12]The court further stated that the practical importance of timely cross-examination "* * * is daily verified by trial lawyers, not one of whom would willingly postpone to both a later date and a different forum his right to cross-examine a witness against his client." 441 P. 2d at 118 (citations omitted).

oath and test of cross examination. Important also is the fact that however much it may have mangled truth, there was assurance of freedom from prosecution for perjury.

The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others; whose interest may be, and often is, to maintain falsehood rather than truth.

There are additional practical reasons for not attaching anything of substantive evidential value to extrajudicial assertions which come in only as impeachment. Their unrestricted use as evidence would increase both temptation and opportunity for the manufacture of evidence. Declarations extracted by the most extreme of "third degree" methods could readily be made into affirmative evidence. In criminal cases the defendant would have a similar opportunity to entrap the state's witnesses, and use as evidence all their extrajudicial assertions. The same enlargement of the field of inquiry would result in civil cases.

If presence of the witness in court under oath and subject to cross examination, is enough to permit admission of his previous statements, the result should not be confined to those which happen to be contradictory. The hearsay rule, if considered satisfied as to contradictory statements, would be equally so as to declarations agreeing with the testimony of the witness. The presence in court, under oath and subject to cross examination, of the declarant, must serve to satisfy the hearsay rule as to both or as to neither kind of declaration. We hold that it is not satisfied in either case and, hence, that the extrajudicial assertion brought in by way of impeachment must be confined to that field.

> The foregoing we consider entirely consistent with the single purpose of rules of evidence, which is to disclose the truth. That implies the necessity for safeguards against abuse. The general admission of earlier, extrajudicial statements would, in practice, endanger rather than facilitate the truth finding process. Different rules, of no present relevance, apply to admissions. Still another rule applies in a proper case where a witness has already testified under oath and subject to cross examination, concerning the same issue, and because of death or some other reason, is unavailable when his testimony is wanted a second time. [285 N.W. at 900-901.]

This Court's Cases

As early as 1945, this Court equated the hearsay rule with the constitutional mandate of fairness in a situation where a prior statement was in part denied by the declarant at trial. In *Bridges v. Wixon*, 326 U.S. 135 (1945), a witness at a deportation hearing admitted making a statement to investigating officers about Bridges but denied that his statement had referred to Bridges' communist activities. Even though this was a civil rather than a criminal proceeding (see pp. 44-45, *infra*), the Court held the use of the prior statement unconstitutional. Said the Court:

> The statements which O'Neil allegedly made were hearsay. We may assume that would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. *Hickory v. United States*, 151 U.S. 303, 309 [1894] ***. So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the motions of fairness on which our legal system is founded. *** [326 U.S. at 153-154.]

Thus, by 1965 this Court could clearly say, "In the constitutional sense, trial by jury in a criminal case necessarily

implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana,* 379 U.S. 466, 472-473 (1965).[13]

While not faced with the precise situation that obtains here, the Court since *Turner* has strengthened the concept of contemporaneous cross-examination and observance of the witness as he gives his incriminating testimony.

Thus, in *Pointer v. Texas, supra,* 380 U.S. 400, the Court applied the Sixth Amendment to the states through the Fourteenth Amendment and held it unconstitutional to admit at trial a statement made at a preliminary hearing by a complaining witness who had not been cross-examined at the hearing (the defendant had been without counsel) and who was no longer available to testify at trial. In a companion case, *Douglas v. Alabama, supra,* 380 U.S. 415, the Court held the confession of an accomplice inadmissible in a state case, even though the accomplice was present at the trial, because he refused to answer cross-examination questions on self-incrimination grounds. The Court emphasized the importance of compelling the witness to stand face-to-face with the jury so that his demeanor and manner could be judged by the trier of fact.

In *Parker v. Gladden,* 385 U.S. 363 (1966), the Court, quoting *Turner,* again reversed a state conviction because a bailiff had made remarks against the defendant that had been overheard by several jurors. His remarks constituted

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[13] Similarly, in interpreting a section of the Philippine Bill of Rights, held to be substantially the same as the Sixth Amendment, the Court pointed out that the right of confrontation "*** intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination" (*Dowdell v. United States,* 221 U.S. 323, 330 (1911)).

"evidence" as to which the defendant had no confrontation and no cross-examination.

In *United States v. Wade*, 388 U.S. 218 (1967), even though witnesses appeared personally at trial and identified the defendant as the guilty party, the Sixth Amendment was held violated because the courtroom identification could have resulted from a prior police lineup identification at which the defendant was not represented by counsel. Said the Court: "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him" (*id.* at 235). Similarly, in *Gilbert v. California*, 388 U.S. 263 (1967), where in-court identifications may have been, or were, tainted by identifications at a lineup of which the defendant's attorney had no knowledge, the conviction was vacated.

In a case of particular importance here, the Court in *Smith v. Illinois*, 390 U.S. 129 (1968), held that it was unconstitutional in a state trial not to allow the defense to ask a key witness for the prosecution what his real name and address were. The reason the case is significant is that the questions asked were seemingly insignificant, and yet the Court, relying extensively on *Alford v. United States*, 282 U.S. 687 (1931), pointed out that "a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them" would deny a fair trial—an observation that goes to the essence of the problem facing the respondent here.

Smith was followed a few months later by a case of even greater significance. In *Barber v. Page*, *supra*, 390 U.S. 719, the Court gave strong indication that it is not cross-examination in general which is constitutionally vital but rather the right to contemporaneous cross-examination before the trier

of fact. In that case, a witness who testified against the defendant at a preliminary hearing was unavailable at trial. He had not been cross-examined by the defendant's counsel at the preliminary hearing, and therefore this Court could have rested its rejection of the prior testimony on this ground. Instead, however, the Court went on to say: "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. See *Motes v. United States*, 178 U.S. 458 (1900). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weight the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial" (*id.* at 725).

That same year, in *Bruton v. United States*, 391 U.S. 123 (1968), a witness testified at a joint trial of Bruton and Evans that Evans had confessed to him in a statement implicating Bruton. The jury was instructed, and this Court strongly agreed,[14] that the statement was inadmissible hearsay against Bruton. The state court subsequently held that the statement should not even have been admitted against Evans, since it had been obtained while he was in police custody and without counsel. This Court ruled that, despite the instruction to the jury, there was a possibility that the jury could have considered the statement as indicative of Bruton's guilt, and therefore its introduction denied Bruton his constitutional right to cross-examination. In so ruling, the Court noted: "*** The reason for excluding

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[14] "We emphasize that the hearsay statement inculpating petitioner [Bruton] was clearly inadmissible against him under traditional rules of evidence, see *Krulewitch v. United States*, 336 U.S. 440 [1949]; *Fiswick v. United States*, 329 U.S. 211 [1946], the problem arising only because the statement was *** admissible against the declarant Evans***." (391 U.S. at 128 n. 3).

this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter. Surely the suggestion is not that *Pointer v. Texas*, for example, be repudiated and that all hearsay evidence be admissible so long as the jury is properly instructed to weigh it in light of 'all the dangers of inaccuracy which characterize hearsay generally.'***" (391 U.S. at 136 n. 12; emphasis by the Court).

The following year, in *Berger v. California*, *supra*, 393 U.S. 314, the Court unanimously gave *Barber v. Page* full retroactive application. In *Berger*, defense counsel had an opportunity to cross-examine the victim of a robbery when he testified against the defendant at a preliminary hearing. At time of trial, the witness was no longer in the state, and despite several attempts by the state to contact him, he did not appear at trial. The Court held that since the state had not made a sufficiently good-faith effort to obtain the witness' presence at trial, the introduction of his preliminary hearing testimony was unconstitutional. And in so finding, the Court stressed that "***one of the important objects of the right of confrontation was to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses" (*id.* at 315).[15]

We recognize that in all the Sixth Amendment confrontation cases to date, this Court has directly concerned itself only with instances where the accused was either completely denied the right to cross-examine a witness or denied the right to cross-examine at trial. The Court must now decide for the first time whether, when a witness appears and is cross-examined at trial, extrajudicial statements made by him and not adopted or affirmed on the stand may be admitted as evidence for the truth of the matter asserted.

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[15]The State cites and seems to rely on *Harrington v. California*, 395 U.S. 250 (1969). The United States does not even cite the case, and it is difficult to ascertain its pertinency. That case merely held that proof of one defendant's guilt was so overwhelming that the unconstitutional admission of statements by co-defendants was harmless beyond a reasonable doubt.

We submit that while the Court has not directly faced under the Sixth Amendment the precise question at issue here, certainly the result reached by the California Supreme Court was pre-ordained by this Court's earlier decisions. The Court has continually stressed the importance of the incriminating evidence coming from the witness stand where the defendant and the trier of fact can look the witness in the face, weigh his demeanor, and assess his credibility (*Turner, Douglas, Barber*). It has recognized both the vital importance of cross-examination in ferreting out the facts (*Pointer, Parker*) and the many dangers of hearsay evidence (*Bruton*). And it has emphasized that the personal appearance of the witness at trial is irrelevant if in fact the witness for some reason cannot be fully cross-examined (*Douglas*) or if the defendant cannot know the prior facts on which to base a meaningful cross-examination (*Wade, Gilbert, Smith*). The fact is that at least the statements excluded in *Bridges, Wade,* and *Gilbert,* and perhaps more, would all have been admissible if the view now espoused by the State of California and embodied in the California Evidence Code had been adopted by this Court in its prior decisions.

Exceptions to the Right

We recognize that the right of confrontation has its exceptions, and that such exceptions are not static and may be enlarged "***if there is no material departure from the reason of the general rule." *Snyder v. Massachusetts,* 291 U.S. 97, 197 (1934). This Court has not delineated generalized standards for testing the constitutionality of exceptions to the hearsay rule. But at least one Court of Appeals has done so, stating that

> While the Sixth Amendment does not prevent creation of new exceptions to the hearsay rule based upon *real necessity and adequate guarantees of trustworthiness*[16], it does embody those requirements as es-

[16] The guarantee consists of "a circumstantial probability of trustworthiness." *Mathews v. United States, supra,* 217 F.2d at 417.

> sential to all exceptions to the rule, present of future. To hold otherwise would be to hold that Congress could abolish the right of confrontation by making unlimited exceptions to the hearsay rule. [*Mathews v. United States*, 217 F.2d 409, 418 (5th Cir. 1954) (emphasis added).]

One commentator has also argued that the exceptions cited in *Pointer v. Texas, supra,* indicate that necessity and reliability of the statement are the two necessary criteria for exceptions to the right of confrontation.[17] Similarly, another has commented that the right of confrontation prohibits the admission of extrajudicial statements which were not originally made "under circumstances which vouch for [their] reliability and trustworthiness." Note, 22 Ark. L. Rev. 784, (1969).

The specific exceptions discussed or cited by this Court—prior testimony[18] and dying declarations[19]—substantiate the position that an exception to full confrontation at trial must be supported by *both* necessity *and* reliability (*i.e.*, circumstantial probability of trustworthiness), as the United States recognizes in its Amicus brief (p. 7). This Court has further emphasized the need for necessity in *Barber v. Page, supra,* and the need for reliability in *Bridges v. Wixon, supra.*

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[17] See Comment, "Federal Confrontation: A Not Very Clear Say on Hearsay," 13 U.C.L.A. L. Rev. 366, 372-379 (1966).

[18] See, *e.g.*, *Mattox v. United States*, 156 U.S. 237 (1895), and *Barber v. Page, supra.* In this exception, necessity is provided by the unavailability of the witness, and reliability is provided by the previous opportunity effectively to cross-examine the witness.

[19] See, *e.g.*, *Mattox v. United States, supra.* In this exception, necessity is again provided by the unavailability of the witness, and reliability is provided, at least in theory, by the belief that a man would not die with a lie on his lips.

(a) *Necessity*

A close examination of this Court's confrontation cases, which have imposed a very strict standard of necessity (*e.g.*, *Barber v. Page, supra,* and *Berger v. California, supra*), and of the hundreds of other federal and state cases dealing with necessity, show that the exception encompasses in almost every case[20] not the unavailability of certain testimony but the impossibility of producing the witness. Once the witness is present, it is no excuse to say that he refuses to testify to what the state wants him to, and that this refusal "necessitates" the introduction of his prior statements over his protest. Moreover, there are even exceptions to the "necessity" exception. An illegally obtained confession, for example, could never be introduced on some theory of necessity.

But perhaps most importantly, the entire concept of necessity carries with it the implicit assumption that, were the declarant actually testifying in court, he would *affirm* his hearsay statement.[21] As one commentator has stated,

> The basic rationale supporting use of prior recorded testimony is that the identity or similarity of issues and parties assures that the testimony given in the first proceeding will be *substantially identical to that*

[20] For an example of alleged necessity other than unavailability of the witness, see the Federal Business Records Act, 28 U.S.C. § 1732-33, as amended 28 U.S.C. 1732(b) (Supp. V 1964). Necessity is said to be provided by the virtual impossibility of proof under strict hearsay principles where large bookkeeping staffs or bookkeeping machines are used. *Palmer v. Hoffman,* 318 U.S. 109, 112 (1943). This Court has not ruled on its constitutionality in criminal cases.

[21] Indeed, Judge Learned Hand, whose opinion in *DiCarlo v. United States,* 6 F.2d 364 (2d Cir. 1925), is often cited in support of the academic position (see Petitioner's Opening Brief at 19, 35), greatly limited *DiCarlo* by his later opinion in *United States v. Block,* 88 F. 2d 618 (2d Cir. 1937), in which he stated that prior statements of a witness could be admitted only if the witness in some way can rationally be said to have affirmed them on the stand.

> *which would be given in the subsequent proceeding.* [Note, "The Use of Prior Recorded Testimony and the Right of Confrontation" 54 Iowa L. Rev. 360, 373 (1968) (emphasis added).]

Thus, the prosecution can rely on testimonial evidence from a witness only where that testimony is either given in court or would have been given in court. *Mattox v. United States, supra,* supports this proposition. After an initial conviction of the defendant had been reversed, the Court upheld the admissibility at the second trial of testimony given at the first trial by two witnesses who had died between trials.

> To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarranted extent. [156 U.S. at 243.]

But there is a great difference between the use of a prior statement of a witness who is no longer available, and who presumably would give the same testimony, and that of a witness who now denies the accuracy of the prior statement and refuses to affirm that statement in the presence of the accused and the trier of fact. In the case of prior *inconsistent* statements, necessity is not present. Necessity requires more than the need of evidence to obtain a conviction. As shown above, it embodies a condition, a belief, that the declarant would tell the same story at trial. But here precisely the opposite situation obtains. Porter, the witness testifying at trial under the very conditions of confrontation designed to elicit the truth, whose memory of the events in issue is virtually as fresh as when he made his prior statements, in fact repudiates the accuracy of those statements.

To say that "necessity" is present in this case is to say that the State has a right to convict and that only by introducing a prior statement can it do so. There is no right to convict unless we are to assume that a defendant is guilty until he proves his innocence. If, as the State says, Porter's presence in court is sufficient to satisfy all of respondent's

confrontation needs, why is his presence in court not equally sufficient to satisfy the State's prosecutional needs? We say the State must proceed with whatever it can produce on the stand, rather than using the witness as merely a conduit, an excuse, for the introduction of stale evidence, the circumstances surrounding which the trier of fact will never discover.

Why do we have a right of confrontation? Why do we prohibit convictions based on *ex parte* affidavits? We grant confrontation to the accused in the belief that when the witness is face to face with the accused and is telling his story in court, in full view of the trier of fact and subject to cross-examination, he will be most impelled to tell the truth, and his story can best be judged by the trier. But here, with all the conditions of confrontation met, we find that because Porter was under the influence of LSD, he could not have known what happened on the day the crime allegedly took place. Is this Court to say that the prosecution may avoid resting on the testimony resulting from the precise conditions for receiving testimonial evidence created by the right of confrontation, and instead introduce testimony that did not result from those conditions?

(b) *Trustworthiness*

Even assuming arguendo that necessity exists, the State cannot use Porter's prior statements without showing that those particular statements were of a nature giving them a probability of reliability. This it cannot do.

Cross-examination at the preliminary hearing is not equivalent to cross-examination at trial, is not therefore an acceptable substitute for cross-examination at trial, and does not provide the necessary probability of trustworthiness to the testimony given at the hearing. The rationale supporting reliance on testimony at former hearings depends on cross-examination at that hearing to test adequately the veracity of the witness' testimony, thereby creating the degree of probable truthfulness constitutionally necessary to support admissibility at a later trial.

This Court has itself recognized that "a preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial," and has left open the question of the adequacy of using testimony from preliminary hearings under the prior testimony exception. *Barber v. Page, supra,* 390 U.S. at 725.

The Third Circuit has recognized a clear distinction between a preliminary hearing and trial:

> In the case of a prior trial the goal of the cross-examiner is precisely the same as that which he would have followed at the second trial—acquittal of the defendant. At the preliminary hearing, however, the cross-examiner is much more narrowly confined by the nature of the proceeding. The government's aim is merely to show a prima facie case and its tactic is to withhold as much of its evidence as it can once it has crossed that line. The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case remains still in doubt. The cross-examiner therefore is in a far different position than he would be at trial, where the government must go beyond its prima facie case to convince the jury of the defendant's guilt beyond a reasonable doubt. Everyday experience confirms the difference, for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial. Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing. [*Virgin Islands v. Acquino,* 378 F.2d 540, 549 (3d Cir. 1967).]

This reasoning is applicable in California.

> In most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement—

> an order holding the defendant for trial. Only television lawyers customarily demolish the prosecution in the magistrate's court. The prosecution need show only "probable cause," a burden vastly lighter than proof beyond a reasonable doubt. [*People v. Gibbs*, 63 Cal. Rptr. 471, 475 (Cal. App. 1967) (citations omitted.)]

The California Supreme Court aptly stressed that cross-examination at the preliminary hearing will usually be conducted in a different manner than at trial, both for strategic reasons and because the issue at stake is significantly different. Moreover, it was noted that there is seldom time before a preliminary hearing to prepare adequately for cross-examination.

For these reasons, cross-examination of testimony at the preliminary hearing does not insulate that testimony from the constitutional inadequacies of all other prior inconsistent statements. It goes almost without saying that Porter's statement to Officer Wade, which was not even under oath,[22] much less subject to contemporaneous cross-examination, not only carries with it no element of trustworthiness but calls for great skepticism and suspicion on the part of the Court. We discuss this more fully below.

Some of the cases and commentators cited by the State have remarked that generally a prior statement is to be considered more reliable than a later one, because it was made closer to the events about which it deals. But the instant case shows the danger of any such generalization. Here,

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[22] As to the total lack of value to be accorded a statement that was never even sworn to, see *Ferguson v. Georgia*, 365 U.S. 570, 587-589 (1961). Yet unlike the statement in *Ferguson*, that was introduced but not treated as evidence, the unsworn statement in this case was used as evidence of guilt—and may, in fact, have been the only evidence used by the court to convict, since we have no way of knowing whether the trial judge relied on the statement to Officer Wade, the statement at the preliminary hearing, or both (although they conflicted).

Porter made his first two statements implicating respondent while Porter himself was in police custody charged with a crime. His last two statements—during and after trial—either absolved or failed to involve respondent, and these statements were made while Porter was a free man, out of police control, and after the charge agianst him had been settled by his being placed on probation. Moreover, the entire time span between his first statement implicating respondent and the one he made at trial which failed to implicate respondent was only nine weeks. Therefore, the generalization that a prior statement should be regarded as more trustworthy utterly breaks down in the face of practical facts such as those present here. In terms of this specific case, probably the most trustworthy statement from a logical standpoint was the one Porter made *after* trial, when he was not duty-bound to speak at all, and when the facts he related squared nicely with other independent evidence brought out at the trial.

The authorities cited by the State also ignore the point that in cases where, unlike here, there is a long time lag between the first statement and the declarant's appearance at trial, it is all the more difficult to cross-examine him on his now-ancient prior statement. In other words, it is not merely a question of which statement is more trustworthy; the issue is also whether the defendant really is afforded the opportunity to which he is constitutionally entitled to discover the facts surrounding the statement being used to convict him. That opportunity diminishes the more ancient the prior statement becomes. The situation is further complicated by the fact that the prior statement is apt to harden with time and becomes increasingly difficult to modify by cross-examination, as the California Supreme Court has most convincingly demonstrated.

In any event, it is clear that merely because one statement is earlier than another, this does not provide the de-

gree of reliability to justify waiving a constitutional requirement.[23] And it certainly does not apply in this case.

Three Aspects of Confrontation

There are thus at least three important aspects of confrontation which the orthodox position protects but which are abandoned by the academic position here urged by the State. First, there is the requirement that the witness give the testimony upon which the prosecutor relies for conviction while the witness is confronted and cross-examined by the defendant at trial—a requirement designed to maximize the likelihood that the witness will tell the truth. Second, the ultimate trier of fact is allowed to view the demeanor of the witness while incriminating testimony is actually being given, so that its truth or falsity can more surely be determined. And, finally, the subjective moral impact of the courtroom is brought to bear to aid in eliciting the truth at the very time the all-important testimony is being produced.

None of these requirements is met in a case in which the rendition of the prior, incriminating statement is never observed by the trier of fact. In any effective sense, in fact, the accused is not even confronted with the witness against him when prior statements such as the one introduced here

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[23] There may be types of prior statements, such as prior identifications (see *United States v. DeSisto*, 329 F.2d 929 (2d Cir. 1964); *People v. Ghould*, 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (1960)), involving perceptions which are particularly subject to deterioration over time and which, as a class, might be constitutionally admissible (although, in such cases, because of the critical nature of the evidence developed, contemporaneous cross-examination might still be required, *cf. Gilbert v. United States, supra*). But this does not hold true for all prior testimonial recitations. For support of this distinction, see Note, 82 Harv. L. Rev. 472 (1968). Moreover, the problems of failing memory of witnesses in criminal cases should be addressed by meeting the constitutional requirement for a speedy trial rather than accepting delay and then diluting the constitutional right of confrontation.

are used against him. The body of one witness is the same as that of the other; but the witness who appeared at the preliminary hearing and purported to testify to one set of facts cannot in any meaningful sense be said to be the same witness who appeared at trial and stated unequivocably that he was under the influence of LSD at the time of the crime and could not possibly recount anything that occurred. Porter could not stand cross-examination at the trial on the statement he had given at the preliminary hearing; he could only offer that he did testify to those facts at the preliminary hearing, and therefore "that is probably what happened," but that actually his memory was not refreshed as to what really occurred at the time of the crime, and he was simply unable to be sure now what did occur in view of the condition he had been in at the time (n. 4, *supra*). Porter could stand cross-examination only in the sense that a complete amnesiac could be said to be able to stand cross-examination on past events; he was physically present in the courtroom, and that was all.

As for the statement Porter allegedly made to Officer Wade, the first question is whether Officer Wade told the truth about what Porter said to him. That issue could productively be explored on cross-examination of Officer Wade. The next question, however, is whether what Porter told Officer Wade about respondent's conduct was true. This could not productively be explored by cross-examination of Officer Wade, because he did not know whether the facts were true or not, or of Porter, because he remembered nothing of the events about which he reported to Wade.

If Porter was telling the truth at trial, it necessarily follows that his prior statements were of no evidentiary value whatever. This is because Porter's trial testimony taken as a whole makes it clear that the effect of the LSD at the very time of the alleged crime prevented him from *ever* knowing what occurred. "What is seen [after one takes LSD] is not found in objective reality, but arises from within oneself" (Appendix B, *infra*, p. B.4). In other words, Porter was legally unconscious or mentally absent at the

time of the crucial events, and therefore no subsequent story of what occurred could have any validity.

If, on the other hand, the trier of fact at trial determined that Porter was lying at trial, that still settles nothing insofar as respondent's guilt is concerned. The mere fact that Porter lied at trial would not necessarily mean that any prior statement was truthful. This is illustrated by the fact that Porter's two prior statements conflict with each other in substantial, fundamental respects, so that he might have been lying on one or both prior occasions *as well as* at trial. There was no trier of fact, presiding magistrate, or any one else present to observe Porter's demeanor when he gave his statement to Officer Wade, and the trier of fact at trial, an entirely different person than the presiding magistrate at the preliminary hearing, could hardly determine whether Porter was lying at that hearing. As this Court pointed out in *Mattox v. United States, supra,* 156 U.S. at 242-243, "The primary object of the constitutional provision in question was to present depositions or *ex parte* affidavits *** being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[24]

The trier of fact at trial in this case had no way of telling what Porter's "demeanor" had been when he gave his two prior statements, nor "the manner in which he [gave] his testimony." As a matter of fact, California law—and the law in numerous other jurisdictions as well—would prevent the trier of fact at trial from standing "face to face" with the witness prior to trial, even at a preliminary hearing, because preliminary hearings in California are con-

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[24] Quoted with approval in *Douglas v. Alabama, supra,* 380 U.S. at 418-419, and *Barber v. Page, supra,* 390 U.S. at 721.

ducted by either a committing magistrate (as in this case) or a justice of the peace, whereas trials for offenses such as the one involved here are held before judges of the Superior Court. Thus, it is no accident that Porter's statement at the preliminary hearing was heard by one judge and his statement at trial by another; that would invariably occur in California and in many other states.

Practical Results of Adopting the State's Position

If this Court were to adopt the State's position, the impact on pre-trial procedures of all kinds would be incalculable. Prosecutors would take series upon series of *ex parte* statements from every available witness with the knowledge that the "right" story from the prosecutor's standpoint, once related, could constitute sufficient proof to convict at trial. Moreover, even if this Court were to reject the broad rule sought by the State and hold that a statement is admissible at trial only so long as the declarant had been cross-examined when the statement was made, it is no exaggeration to suggest that many pre-trial confrontations, examinations and proceedings which are now carefully restricted to the determination of extremely narrow issues would necessarily be expanded into full-dress hearings on a par with the trial itself. These hearings would include not only preliminary hearings but hearings on motions to suppress evidence, hearings on sanity and ability to stand trial, administrative agency proceedings where a statute or rule requires an opportunity for cross-examination (*e.g.*, discharge of an employee), lineups (to a limited extent), etc.

Both prosecutors and defense counsel, anxious to preserve the testimony of all material witnesses, and to commit those witnesses to a specific story, would at every pre-trial opportunity attempt to put a raft of witnesses on the stand. Both prosecutors and defense counsel, once opposing witnesses had taken the stand, would be duty-bound to conduct full-scale, unlimited cross-examination on those statements for fear that, as in the instant case, it will be

too late at trial to confront the witness on a cold record. The result will be more witnesses, more testimony and more cross-examination at various proceedings prior to trial than we have ever known in our judicial system.

Other results will flow. For example, the Sixth Amendment right to counsel is intimately involved here. This Court has ruled that "*** today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality"; that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial," and that "The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *United States* v. *Wade*, *supra*, 388 U.S. at 224, 226, 227. Does it not follow as night follows day that if a statement given by a witness to a police officer can itself be used to convict a defendant at trial, regardless of what the witness says at trial, the defendant is entitled to have his counsel present when the witness is questioned?[25] If it is true, as this Court has said, that " 'in practice the issue of identity may *** for all practical purposes be determined there and then [at the lineup] before the trial' " (*United States* v. *Wade*, *supra*, 388 U.S. at 229), is it not equally obvious that the issue of guilt may for all practical purposes be settled when the key witness first tells his story? The burden placed on both assigned and retained counsel to be present whenever such statements are made would be enormous—in fact, impossible. It would mean the appointment of counsel in indigent cases at a far earlier stage than the

[25]See *White* v. *Maryland*, 373 U.S. 59 (1963), where a preliminary hearing was held to be a critical stage of the trial process because a plea of guilty at that hearing was later used at trial as evidence.

courts have required to date. It would even encourage prosecutors to put off charging a suspect until statements have been obtained from all material witnesses, thus making it impossible for subsequently-appointed defense counsel to participate in the taking of statements.

Moreover, the requisites that presently comprise the constitutionally guaranteed "effective assistance of counsel" would be extraordinarily expanded. For example, in the instant case, even though defense counsel may have deliberately steered clear of the subject of LSD at the preliminary hearing so as to retain a crippling weapon at trial, that same step might be deemed ineffective assistance if Porter's preliminary hearing statement could alone convict respondent. Imagine too the pressures this procedure would place on all defense counsel to prepare themselves adequately for various pre-trial proceedings. Under the Federal Magistrates Act, for example, it is required that in certain circumstances and unless there is consent to a continuance, the preliminary hearing must be held within ten days of the initial appearance of the prisoner before the magistrate (presumably at the time of his arrest). 18 U.S.C. § 3060, as amended by P.L. 90-577, § 303 (1968). How can counsel appointed subsequent to arrest possibly be prepared in that time for a full-scale cross-examination of the Government's witnesses (see n. 28, *infra*)? On the one hand, the preliminary hearing is supposed to provide a speedy means of determining the question of probable cause, and yet on the other, this Court has held it a denial of counsel and of due process not to permit counsel a reasonable time to prepare for trial[26]—a ruling equally applicable to a preliminary hearing if that is where statements to be used for proof of guilt are to be taken.

If the State's position is adopted, what is the fate of all the traditional distinctions this Court has drawn between preliminary hearings and trials? For example, in *Roviaro v.*

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[26] *White v. Ragen*, 324 U.S. 760 (1945); *Reece v. Georgia*, 350 U.S. 85 (1955).

United States, 353 U.S. 53 (1957), the Court held that *at trial*, the police must reveal the identity of an informer because his possible testimony might be highly relevant to the case. Yet when the same question arose over similar testimony at a preliminary hearing, the Court held that the informer need not be identified. *McCray v. Illinois*, 386 U.S. 300 (1967). Repeatedly, the Court emphasized the difference between the two forums: "When the issue is not guilt or innocence, but, as here, the question of probable cause for an arrest or search ***" (*id.* at 305); " 'We must remember also that we are not dealing with the trial of the criminal charge itself' " (*id.* at 307); "The *Roviaro* case involved the informer's privilege, not at a preliminary hearing to determine probable cause for an arrest or search, but at the trial itself where the issue was the fundamental one of innocence or guilt" (*id.* at 309).[27] Yet if the preliminary hearing is to be converted into a forum where the statements taken can be used to convict at trial, the distinctions delineated by the Court in these cases break down, and the defendant must be allowed full recourse to all the facts at his preliminary hearing, to the same extent as he would be at trial.

Along a similar vein, it should be made clear that the expansion of pre-trial hearings might not only be at the behest of the prosecutor. In *Iowa v. Washington*, 160 N.W.2d 337 (Iowa 1968), for example, the defense attempted to introduce at trial the testimony of a witness for the State at a preliminary hearing. The witness was not available at trial. Pointing out that a preliminary hearing "is not a trial" and is "ordinarily a much less searching exploration into the merits of a case than a trial, because its function is the more limited one of determining whether probable cause exists to hold the accused for trial," (*id.* at 339), the court rejected the testimony.

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[27] To the same effect, see *United States v. Tucker*, 380 F.2d 206 (2d Cir. 1967); *United States v. Shyvers*, 385 F.2d 837 (2d Cir. 1967), *cert. denied*, 390 U.S. 998 (1968).

Similarly, in *Sciortino v. Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968), the defendant urged that the preliminary hearing be used as a means of discovery for the defense, but the Court of Appeals ruled that such a hearing has no "purpose other than to afford a person arrested upon complaint an opportunity to challenge the existence of probable cause for detaining him or requiring bail" (*id.* at 133). To the same effect, see *United States v. Conway*, 415 F.2d 158 (3d Cir. 1969), and *United States v. Motte*, 251 F. Supp. 601, 606 (S.D.N.Y. 1966).

In *United States v. Hinkle*, 307 F.Supp. 117 (D.C.D.C. 1969), the court pointed out that to turn the preliminary hearing into a forum for discovery and other purposes would mean that "the hearing would take on overtones of a trial." In view of the limited function of the hearing, the court turned down the defendant's argument that he had been improperly restricted in his cross-examination of the witnesses who appeared against him at that hearing. Yet if the State's position is upheld in the instant case, it is difficult to imagine *any* limitation on the defendant's right to cross-examine, since the direct examination can be introduced at the trial for the truth of the facts therein, and it may, as in this case, form the only evidence capable of convicting the defendant. Cross-examination would have to be at least as broad as—and perhaps broader than—if the direct testimony was being elicited at trial.

In this regard, there are important distinctions between civil and criminal proceedings that bear on the question at issue. Effective cross-examination depends upon preparation. The extensive discovery procedures available in civil cases, which can even permit the discovery of prior statements and the facts surrounding them, may well permit cross-examination at trial sufficient to judge the credibility of former statements. But discovery in criminal cases is still so limited that equally effective cross-examination is

extremely unlikely. Thus, there is an even greater need for requiring that in criminal cases the trier of fact be able to view the demeanor of the witness when he makes his statement, and to enable contemporaneous cross-examination at that time.

A perfect example of the limited role cross-examination has played in the past at preliminary hearings, as contrasted with that at trial, is supplied by this very case. The key fact surrounding the alleged offense, as it developed at trial, was Porter's use of LSD. For if Porter did in fact take LSD just prior to respondent's telephone call, Porter almost certainly would have had too scattered and confused an impression of subsequent events to warrant respondent's conviction. *Yet no question of any kind, either by the prosecution or by the defense, was asked Porter at the preliminary hearing about LSD.* The subject was simply never raised. Whether it was not injected by the defense because there had been insufficient opportunity to discover the facts,[28] or because the subject matter was being saved for

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[28]The record does not show when respondent was arrested, but counsel has been informed by the California Attorney General's Office that it was on January 31, 1967, the same day Porter was interrogated by Officer Wade. Respondent was arraigned the following day, February 1, at which time he was represented by the Public Defender. The record does not show, and counsel has not been informed, when respondent's trial counsel was retained, but even assuming that he was retained immediately following the arraignment, he would have had only six days to prepare for the preliminary hearing. In all likelihood, he had an even shorter period.

The question arises as to what would happen in cases like *Goldberg v. Kelly*, 38 U.S.L.Week 4223 (March 23, 1970), and *Wheeler v. Montgomery*, 38 U.S.L.Week 4230 (March 23, 1970) in which the Court held that welfare recipients are entitled to a *limited* hearing prior to the termination of benefits, and that the right to confront and cross-examine adverse witnesses is an essential part of the hearing. If any future hearing was even potentially involved (particularly of a criminal nature), and California's rule was in effect, the cross-examination at the "limited" hearing would have to be as broad and as unlimited as that at the future hearing itself, in order to

trial as a matter of tactics, or for some other reason, is not clear. The point remains that nothing was asked or said about LSD at that hearing; if it had been, the revelation of Porter's use of the drug at the time of the alleged offense might well have obviated the trial altogether.

As a matter of fact, in view of the long-term and periodic effects of LSD (see Appendix B, *infra*), Porter might well have been under the influence of the drug at the time of his statement to Officer Wade, at the time of the preliminary hearing, or both. It is important to note that while Porter was asked whether he was "on acid" or "under any narcotic sedation" at the time of trial (A. 12), he was not asked whether he had been similarly incapacitated at the time of his statement to Officer Wade or at the preliminary hearing. His confusion prior to trial is illustrated by the fact that he thought the bag he sold to Officer Dominquez had different markings and was constructed differently than the one identified by the officer himself (A. 56-57).

If the State's broad position is adopted—that any statement is admissible so long as the declarant is available for cross-examination at trial—the defendant is placed in the impossible position of not knowing and not being able to discover the circumstances under which the statement was rendered. In the instant case, for example, Officer Wade said he did not think Porter was under the influence of LSD at the time he made his first statement,[29] but the

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protect the recipient's interest. Parenthetically, we note that a statemade in *Goldberg* about caseworkers is particularly applicable to Officer Wade in the instant case: "The second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safety be left to him" (39 U.S.L.Week at 4227).

[29]He did admit, however, that Porter "was between the symptom of being sleepy and between the symptom of being high" (A. 40).

trial judge was quick to point out that Officer Wade was hardly an expert (A. 42). How could respondent possibly have determined whether Porter was in fact under the influence of LSD at the time this crucial statement was made, when neither he, his counsel, nor any one else was present? Similarly, Porter in his fourth statement alleged certain police threats that resulted in his first statement,[30] and yet, since Officer Wade would hardly have admitted making any such illegal threats, respondent could hardly have determined the true facts at trial. The threats, in fact, might have been made by other officers without Officer Wade's knowledge, so that he could hardly have testified to the facts. Thus, adoption of the State's position would be an open invitation to the use of all kinds of physical and psychological methods for extracting untruthful statements from persons prior to trial and out of the sight and control of proper authorities.

It should be stressed, too, that the California statute does not confine itself to hearsay statements made to police officers or other public officials. Just as Porter wanted to "get back" at respondent (A. 60-61, 65, 69), anyone else who wanted to get back at either respondent or Porter or both could have come into court and testified to a statement which Porter allegedly made to him, and this testimony could provide the sole evidence of guilt. *The California statute does not even provide that the declarant acknowledge making the statement,* so that the statement could be entirely fabricated out of thin air, the declarant could forcefully swear that it never was made, and yet the defendant could be convicted on the basis of it.

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[30] "Later, when I was arrested and was in custody, the police kept telling me that they knew it was JOHN GREEN I was involved with and that unless I implicated him that they would see that I was out of circulation for a long time ***" (A. 99-100).

Other results may well follow from approval of the State's position. Since the preliminary hearing is dispensed with in those cases where an indictment is timely returned, approval of the State's position could encourage delays in indictments so that the prosecution can pin down all the statements it needs from material witnesses. Or conversely, if the prosecutor is fearful that statements favorable to the defendant may be presented at a preliminary hearing and thus freeze the position of those witnesses, he could intercede with a grand jury indictment and thus eliminate the preliminary hearing altogether. "It has been consistently held that an accused has no constitutional right to a preliminary hearing." *United States v. Motte*, 251 F. Supp. 601, 603 (S.D.N.Y. 1966); and see *Dillard v. Bomar*, 342 F.2d 789 (6th Cir.), *cert. denied*, 382 U.S. 883 (1965).

Finally, one extraordinary result of an acceptance of the State's position would be that the State would actually benefit by producing a lying witness—the very type of witness Porter was judged to be by the trial court and the prosecutor (n. 2, *supra*). Assume that lying witness X gives a prior statement either to a police officer or to a presiding magistrate. Any jury contemporaneously hearing that statement, watching X's demeanor as he gave it, would recognize his story as a complete fabrication. X takes the stand at trial and either recants his prior statement or gives a different version. Even though X is still lying, the State can use the inconsistency as an excuse to introduce the prior statement and thereby "prove" the matters related in that statement. The jurors can tell that X is lying *now*; but there is no way they can tell whether he was lying when he made the prior statement. Because X is *now* lying, and because he gave a *different* version on a prior occasion, the jury accepts the prior version and the defendant is convicted—on the basis of a lie.

Another unusual and unfortunate result of reversal by this Court would be that prosecutors could be in a stronger position relying on pre-trial statements than on testimony

given directly at trial. To demonstrate, suppose witness X takes the stand and testifies *at trial*, under direct questioning by the prosecutor, to all the facts which Porter gave about respondent at the preliminary hearing in the instant case. At the conclusion of this direct examination, the following cross-examination takes place:

Defense counsel: "Is it not a fact, Mr. X, that some twenty minutes prior to the defendant's telephone call to you, you took LSD?"

A: "I admit it, yes."

Q: "You had taken LSD before?"

A: "Yes."

Q: "And as a result of taking LSD, you became disoriented on this occasion?"

A: "Yes."

Q: "So that in truth you cannot remember whether the defendant even came to your house after that call?"

A: "I agree."

Q: "Or whether, if he came, he brought anything with him?"

A: "I admit it."

Q: "Or whether anyone told you where to find marijuana?"

A: "You're right, I can't be sure."

Q: "Or, for that matter, where you got the marijuana."

A: "That's true."

Is there the slightest question but that, following this cross-examination, the direct testimony would be striken as admittedly untrue or, at the very least, totally discounted by the trier of fact? No appellate court would allow a conviction to rest on such direct testimony immediately followed by the cross-examination above. Yet because in the

instant case the "direct testimony" came in not as trial testimony at all but as part of a statement from some prior proceeding, it attains, under the State's theory, some sacrosanct, unimpeachable status. Even if it were to be conceded that in general (although not here, and see pp. 35-37, *supra*) an earlier statement has some stronger element of trustworthiness than a statement made later in time, surely this element is heavily outweighed by the fact that in the case of the later statement, the *entire* testimony is given under the eyes of the trier of fact. Yet here, the earlier statement becomes, under the State's approach, more invulnerable to attack than if put forward at trial. We submit that this makes no sense whatever.

Much of the discussion above has dealt with pre-trial proceedings at which defense counsel would have the right to cross-examine. It must be emphasized, however, that the California statute is in no way restricted to statements as to which there has been prior cross-examination, and the State is pressing for a rule that would allow *all* statements in evidence so long as the declarant appears at trial and gives testimony in any way inconsistent with the prior statement. Therefore, any statement given to any one prior to trial—even someone not in authority—is potentially admissible. In addition, the following are just a few of the types of actions that might result in statements being given to various officials and not subject to cross-examination prior to trial:

- Police questioning of a "suspicious person" on the street with or without a "frisk."
- Police questioning of possible witnesses either at or away from the police station.
- Pre-lineup confrontation.
- Testimony given to a magistrate designed to obtain a search or arrest warrant.
- Police questioning of a person after arrest when that person volunteers information even after receiving the *Miranda* warnings.

- A Grand Jury proceeding.
- An Inquest.
- Administrative agency hearing or proceeding concerning the possible discharge of an employee where the agency is not required by statute or rule to permit cross-examination.
- Hearings or proceedings considering the disbarment or censure of an attorney by a Bar Association Committee on Admissions and Grievances.
- Court hearing on whether or not to grant bail pending trial, where the judge is permitted to rely on written or oral statements about the defendant which are not subject to cross-examination.
- Staff conferences at a mental hospital to consider mental competency or sanity.
- Statements given to investigative commissions such as the Warren Commission.
- Sentencing proceeding in a criminal case where the judge bases the sentence in part on a Pre-Sentence Report containing statements of various witnesses not subject to cross-examination.
- Probation or parole hearings in which the Board relies on statements about the defendant which were not subject to cross-examination.

Quite obviously, the proliferation of pre-trial and post-trial statements that may be used at trial or in other proceedings will be quite extraordinary—and all to the detriment of the fair and orderly administration of justice as well as the rights of those most in need of protection.

CONCLUSION

Nine appellate judges below—six on the California Supreme Court and three on the District Court of Appeal—unanimously ruled that Section 1235 of the California Evidence Code, under the facts of this case, denied respondent his right to confrontation under the Sixth Amendment to

the United States Constitution. We urge this Court to hold the same. Respondent was effectively denied his right to subject the statements that convicted him to the type of searching, contemporaneous cross-examination that has been a hallmark of our constitutional system. He was denied the right to have the trier of fact judge the manner and demeanor of the witness as he made the incriminating statements. All of the safeguards were missing; all of the conditions tending toward truthfulness were lacking. There was, as in *Bridges v. Wixon*, a fundamental unfairness as well as a denial of specific constitutional rights. In addition, the view pressed by the State will, if adopted, result in a great perversion of all pre-trial proceedings that have heretofore been so carefully limited.

For each and all of these reasons, we respectfully pray that the judgment of the California Supreme Court be affirmed.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved.

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Evidence Code, Section 770.

§770. Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony in the action. (Stats. 1965, c. 299, §770.)

California Evidence Code, Section 1235

§ 1235. Inconsistent statement. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770. (Stats. 1965, c. 299, § 1235.)

California Health and Safety Code, Section 11532.

§ 11532. Every person of the age of 21 years or over who hires, employs, or uses a minor in unlawfully transporting, carrying, selling, giving away, preparing for sale or peddling any marijuana, or who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any marijuana to a minor, or who induces a minor to use marijuana in violation of law, is guilty of a felony punishable by imprisonment in the state prison from 10 years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.

If such a person has been previously convicted once of any felony offense described in this division or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previ-

ous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison from 10 years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 10 years in prison.

If such a person has been previously convicted two or more times of any felony offense described in this division or has been previously convicted two or more times of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison from 15 years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 15 years in prison.

(Added by Stats. 1959, Ch. 1112; amended by Stats. 1961, Ch. 274.)

APPENDIX B

Excerpts from "LSD-25: A Factual Account," published by the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, pp. 11-12 (1969) (emphasis added):

Although the exact biochemical changes that take place within the human body when LSD is ingested are still a mystery in part, much is known about the ways in which the drug produces its effects.

The effects of d-lysergic acid diethylamide (LSD) may be divided conveniently into three groups: central, direct (or peripheral), and neurohumoral.

Central Effects. These are the most readily observable effects of LSD, called central because of LSD's action on the central nervous system. This action is capable of producing, in turn, a wide range of physiological effects. Central effects include:

* Stimulation of electrical activity in the brain, as reflected by activation of the electroencephalograph, the apparatus that detects and records brain waves.

* Stimulation of that part of the brain called the reticular formation, which results in heightened sensitivity to sensory stimuli coming from the outside through the sense organs. *This action causes distortion of what is perceived, leading to hallucinations and various other psychological changes.*

* Stimulation of those parts of the brain called the brain stem, the medulla and the midbrain. Stimulation of these structures causes the pupils to dilate (a common effect of LSD), body temperature to rise, hair "to stand on end," the sugar content of the blood to increase, and a rapid heart rate with elevated blood pressure.

* Nausea, dizziness, headache, and sometimes loss of appetite.

* Stimulation of certain reflexes, such as the knee jerk.

* Decreased muscular coordination and vomiting, especially when large doses of LSD are taken. A fine tremor of the fingers and hands may occur.

Direct Effects. These consist of direct stimulation of smooth muscle resulting in muscular contractions (Smooth muscle refers to the musculature of the intestinal tract, the blood vessels, the uterus, the bladder, and certain other organs. Such muscles are often called involuntary muscles because there is very little or no control over them. Smooth muscle does not need conscious efforts to perform its work). The direct effects of LSD on smooth muscle are also called *peripheral* effects because they are exerted directly on muscle without regard for its control by the brain and spinal cord. This contracting effect of LSD on smooth muscle is dramatically visible in laboratory experiments where blood vessel tissue and uterine tissue from various animals are used to demonstrate the action.

Neurohumoral Effects. These are effects caused by nerve cell transmitters. Transmitters change electrical energy to chemical activity, and vice versa. The principal neurohumoral effect produced by LSD is potent inhibition of a substance called *serotonin.* Serotonin is present naturally in the body, and is said to play a role in the transmission of impulses from one nerve to another in the brain.

The inhibition of serotonin by LSD—that is, the interference with serotonin's ability to aid in the transmission of nerve impulses—was once thought to be the specific mechanism by which LSD caused behavioral and psychic changes. However, the property of LSD had been shown experimentally not to be a direct cause of changed behavioral phenomena. This conclusion is based on the fact that other derivatives of lysergic acid (Brom-LSD, for example), which are even more powerful inhibitors of serotonin, do not produce the potent psychological effects that LSD does. This does not mean that the inhibition of serotonin plays no part in the behavioral changes produced by LSD. It merely indicates that not enough is known about serotonin inhibition

by LSD and that additional facts must be discovered before the role of serotonin is fully understood.

Mixed Messages

Whether by inhibition of serotonin or by other means, it has been established that LSD produces a peculiar effect on the transmission of sensory impulses to the brain. This has been demonstrated in laboratory experiments on sensory response of animals under the influence of LSD.

The normal functioning of the nerves of the visual system in animals can be treated by a series of electrodes placed at various points in the system. When a flash of light hits the eye, these electrodes measure the resulting electrical impulses that pass from the eye's retina (the light-sensitive area) to the brain. During this journey the electrical impulses make their way from the retina to other points in the system: the optic nerve, the geniculate body, and the optic radiation pathway. The impulses lead eventually to the association cortex in the brain where the image or stimulus is interpreted.

When an animal is given LSD, electrical measurements along the optic nerve show that an intensified impulse is received from the retina. Such an exaggeration of the impulse is not due to the intensity of the external stimulus or the source of light but to changes in the receptivity of the visual system which also occur when certain drugs are taken. But unlike the effect of other drugs, the electrical impulses produced continue to increase under LSD influence and to become more distorted as they travel along the optic pathway to the brain. This indicates that LSD has a unique physiological effect on those parts of the visual system called the geniculate body and the optic radiation pathway.

Moreover, when hearing and sight are tested in animals under the influence of LSD, the character of the impulses received and transmitted by one organ are found to be affected by the impulses to the other. *In other words, sights reaching the brain from the eye are changed by sounds, and sounds are changed by what the eye apparently sees. This*

is the effect reported by users of LSD who "see" music, "hear" color, and "feel" visual images. These mixed messages to the brain exhibit the phenomenon in psychology commonly called synesthesia.

Hallucinations

Does LSD really have the power to produce hallucinations—that is, sensory perceptions or illusions having no basis in reality, such as hearing sounds or seeing objects when none are there? The answer is that it does, though the effect is not as common as that of pseudo-hallucinations. The existence of true hallucinations has been proven by still another experiment on the transmission of sensory impulses.

When the eye is disconnected from the optic nerve in an undrugged experimental animal, impulses passing through the optic nerve abruptly cease. If an animal with detached optic nerve is given LSD, the impulses are somewhat diminished but nevertheless still occur. Since the optic nerve has been disconnected from the eye, these impulses cannot possibly be the result of external stimuli. *What is seen is not found in objective reality, but arises from within oneself. This is what is meant by the term hallucination.* Experiments conducted with totally blind human beings using LSD yield similar results.